

A TAY CHONG YEW & ANOR v. ONN KIM MUAH

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: W-02-862-2011]
5 FEBRUARY 2016

C **FAMILY LAW:** Divorce – Maintenance – Reasonable sum – Husband ordered to pay RM4,000 per month to wife – Appeal against decision of High Court – Whether husband gainfully employed – Whether wife had means to support herself – Whether award for maintenance to be varied

D **FAMILY LAW:** Matrimonial assets – Division – Properties – Contribution by spouse – Whether a factor to be considered – Whether properties acquired by first appellant before marriage – Whether inherited – Whether acquired by way of gift – Whether constitutes matrimonial assets – Law Reform (Marriage and Divorce) Act 1976, s. 76

E **FAMILY LAW:** Matrimonial assets – Division – Shares – Whether money transaction involved in purchase of shares – Whether acquired by way of gift – Whether constitutes matrimonial assets

F The first appellant/husband and the respondent/wife were married on 4 November 1981 and the couple had two children. The parties faced matrimonial difficulties which led to the dissolution of their marriage on 3 March 2011. The respondent argued that her marriage with the first appellant broke down due to the intolerable and unreasonable behaviour of the first appellant since he was in an adulterous relationship with the second appellant. The appellants had two illegitimate children. As a result of the said adultery, the respondent contended, *inter alia*, that she suffered emotional, mental torture and loss of consortium. *Vide* the respondent's application, the G High Court ordered, *inter alia*, that (i) the first appellant pay a sum of RM4,000 per month to the respondent as maintenance; (ii) the first appellant pay a sum of RM1,000 per month for the children until they reach 18 years of age; (iii) the second appellant pay a sum of RM100,000 as damages to the respondent; (iv) the first appellant give up 50% ownership of his Taman Desa property, Melaka shop lot and Faber Indah Condominium in favour of the H respondent; (v) the first appellant value his shares in Tong Ah Co Sdn Bhd and give 50% of its worth to the respondent; (vi) the first appellant value his 120 shares in Tay Miang Guan & Co Bhd and give 50% of the valuation to the respondent; and (vii) the first appellant give 50% of the value of his shares in Express Management Services Sdn Bhd and How Tian Enterprise Sdn Bhd to the respondent. Dissatisfied, the appellants appealed to this court. On the I

other hand, the respondent cross-appealed *inter alia* for orders that (a) the half share of the first appellant's ownership in the Taman Desa property should be given to her; (b) the first appellant pay a sum of RM6,000 per month as maintenance to the respondent and RM2,000 to their daughter; (c) the unit of shares owned by the first appellant in Tong Ah Co Sdn Bhd in which the respondent was given 50% was 519 and not 380; (d) the first appellant's half share in Tong Ah Co Sdn Bhd and Tay Miang Guan & Co be transferred to her or for same to be held in trust for their daughters; and (e) the award of damages against the second appellant be increased to RM4 million. The appellants submitted that the judge failed to consider the fact that the first appellant was wholly incapacitated from earning a livelihood due to his ill health and that he also had to maintain his second family which consisted of the second appellant and his two children.

Held (allowing appeal with costs; setting aside/varying decision of High court as case maybe; dismissing respondent's cross-appeal)

Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

- (1) The trial judge failed to fully appreciate the fact that the first appellant was not in a position to be gainfully employed; was incurring high expenditure in medical bills and recuperative costs; and had to support a second family with two children. This was notwithstanding that he was earning an income from dividends of the two companies, *ie*, Tong Ah Co Sdn Bhd and Tay Miang Guan Co Sdn Bhd. On the other hand, the respondent had immovable properties and had some means to support herself and could not be said to be in destitute. (para 59)
- (2) The trial judge erred in finding that the first appellant was solely responsible for the breakdown of the marriage. The respondent knew that the second appellant was an employee of a company belonging to the first appellant, and of her pregnancy and was suspicious of their relationship. There was thus a certain amount of condonation from the respondent in relation to the adulterous relationship between the appellants. However, the first appellant had to pay a reasonable sum as maintenance for the upkeep of the respondent. Hence, the amount of maintenance was reduced from RM4,000 to RM2,000 per month. In addition, since the respondent had condoned to the adulterous relationship, the award of damages of RM100,000 payable by the second appellant should be reduced to RM25,000. (paras 60, 61 & 73)
- (3) The first appellant's half share in the Taman Desa property was acquired by him without any contribution from the respondent. Therefore, the first appellant's half share to this property was not a matrimonial property, notwithstanding the fact that it also happened to be the matrimonial home of the first appellant and the respondent. The said

- A property belonged to the first appellant and his father in equal shares. Therefore, the respondent's cross-appeal was dismissed to this extent. (para 86)
- B (4) By virtue of s. 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), matrimonial assets capable of being ordered to be distributed upon a divorce being granted are assets acquired during the marriage. Hence, s. 76(1) makes reference to 'any assets acquired by them during the marriage by their joint efforts' whilst s. 76(3) makes reference to 'any assets acquired during the marriage by the sole effort of one party'. On the facts, the Melaka shop lot was a gift to the first appellant. Therefore,
- C the shop lot did not form part of the matrimonial assets. In the circumstances, s. 76(5) was not applicable in respect of this property. (para 88)
- D (5) The property acquired before marriage and inherited property acquired during marriage comes from a source wholly external to the marriage. The spouse to whom it was given should be allowed to keep it. This was so especially when s. 76(4)(a) of the Act was taken into account. On the facts, since the condominium was a gift by Tay How Seng to the first appellant, it could not be said to be a matrimonial asset, notwithstanding that it was acquired during the subsistence of the marriage. (para 91)
- E (6) The trial judge erred in holding that the respondent was entitled to 50% of the 380 shares in Tong Ah Co Sdn Bhd. The 139 shares were a gift to the first appellant when he was a child and could not form part of the matrimonial asset. The 380 shares were also gifts to the first appellant where there was no money transaction for the transfer of all these 380
- F shares from Tay How Seng to the first appellant. All 120 shares in Tay Miang Guan Sdn Bhd given to the first appellant were also gifts since there was no money transaction between Tay How Seng and the first appellant. In the circumstances, the first appellant's appeal was allowed and the respondent's cross appeal on this aspect was dismissed. (paras 95 & 98)
- G (7) The shares in both Express Management Services Sdn Bhd and How Tiam Enterprise Sdn Bhd held by the first appellant were worthless since they were making losses. The first appellant's argument that the respondent had to equally bear the losses incurred by both these
- H companies did not have merits. The distribution order was in regard to the shares *per se* and did not involve the internal affairs of these companies regarding the losses suffered by them. (paras 99 & 100)
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Bahasa Malaysia Headnotes

Perayu pertama/suami dan responden/isteri telah berkahwin pada 4 November 1981 dan dikurniakan dua orang anak. Pihak-pihak mengalami masalah dalam perkahwinan hinggalah perkahwinan mereka dibubar pada 3 Mac 2011. Responden menghujahkan bahawa perkahwinannya dengan perayu pertama bermasalah disebabkan tingkah laku perayu pertama yang mengadakan hubungan zina dengan perayu kedua. Perayu-perayu mempunyai dua orang anak luar nikah. Akibat hubungan mereka, responden menghujahkan, antara lain, bahawa dia mengalami tekanan emosi, mental dan kehilangan konsortium. Melalui permohonan responden, Mahkamah Tinggi memerintahkan, antara lain, agar (i) perayu pertama membayar nafkah RM4,000 sebulan kepada responden; (ii) perayu pertama membayar RM1,000 sebulan kepada anak-anaknya sehingga mereka mencapai umur 18 tahun; (iii) perayu kedua membayar RM100,000 sebagai ganti rugi kepada responden; (iv) perayu pertama memberi 50% hartanahnya di Taman Desa; rumah kedai di Melaka dan Kondominium Faber Indah kepada responden; (v) perayu pertama menilai 380 sahamnya di Tong Ah Co Sdn Bhd dan memberi 50% nilai tersebut kepada responden; (vi) perayu pertama menilai 120 sahamnya di Tay Miang Guan & Co Bhd dan memberi 50% nilai tersebut kepada responden; dan (vii) perayu pertama memberi 50% nilai sahamnya di Express Management Services Sdn Bhd dan How Tian Enterprise Sdn Bhd kepada responden. Tidak berpuas hati, perayu-perayu merayu ke mahkamah ini. Sebaliknya, responden memfailkan rayuan balas, antara lain, untuk mendapatkan perintah agar (a) separuh milikan perayu pertama dalam hartanah Taman Desa diberi kepadanya; (b) perayu pertama membayar RM6,000 sebulan sebagai nafkah untuknya dan RM2,000 untuk anak perempuan mereka; (c) jumlah unit saham milik perayu pertama dalam Tong Ah Co Sdn Bhd di mana responden telah diberi 50% adalah 519 dan bukannya 380; (d) setengah bahagian saham perayu pertama dalam Tong Ah Co Sdn Bhd dan Tay Miang Guan & Co dipindah milik kepadanya atau perayu pertama diperintah memegang saham tersebut sebagai amanah untuk anak-anak perempuan mereka; dan (e) award ganti rugi terhadap perayu kedua dinaikkan ke RM4 juta. Perayu-perayu menghujahkan, antara lain, bahawa hakim bicara gagal mempertimbangkan fakta bahawa perayu pertama tidak berupaya untuk bekerja disebabkan keadaan kesihatan yang tidak mengizinkan dan dia juga terpaksa menjaga keluarga keduanya iaitu perayu kedua dan anak-anaknya.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan/mengubah keputusan Mahkamah Tinggi di mana perlu; menolak rayuan balas responden)

Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

- (1) Hakim bicara gagal menilai fakta bahawa perayu pertama tidak boleh bekerja, sedang menanggung perbelanjaan tinggi untuk bil perubatan dan kos pemulihan dan perlu menanggung satu lagi keluarga dengan dua

- A orang anak. Tanggungan ini perlu diteruskan walaupun perayu pertama memperoleh dividen daripada dua syarikat, iaitu, Tong Ah Co Sdn Bhd dan Tay Miang Guan Co Sdn Bhd. Sebaliknya, responden mempunyai harta tak alih dan mampu menanggung dirinya dan tidak boleh dikatakan sebagai seorang yang tidak mempunyai kemampuan.
- B (2) Hakim bicara khilaf dalam dapatannya bahawa punca keruntuhan perkahwinan disebabkan oleh perayu pertama sahaja. Responden mengetahui bahawa perayu kedua adalah pekerja sebuah syarikat milik perayu pertama dan bahawa perayu kedua telah mengandungi dan telah juga mengesyaki hubungan antara kedua perayu. Walaupun begitu
- C responden hanya membiarkan hubungan zina antara perayu-perayu. Walau bagaimanapun, perayu pertama perlu membayar jumlah yang munasabah sebagai nafkah kepada responden. Oleh itu, jumlah nafkah dikurangkan daripada RM4,000 kepada RM2,000 sebulan. Memandangkan responden telah membiarkan hubungan zina antara
- D perayu-perayu, jumlah award ganti rugi RM100,000 yang perlu dibayar oleh perayu kedua kepada responden dikurangkan kepada RM25,000.
- (3) Sebahagian milikan perayu pertama dalam hartanah Taman Desa diperolehi tanpa sebarang sumbangan daripada responden. Oleh itu, sebahagian milikan perayu pertama untuk hartanah ini bukanlah aset perkahwinan, walaupun rumah tersebut merupakan rumah kelamin
- E perayu pertama dan responden. Hartanah itu dimiliki oleh perayu pertama dan bapanya sama rata. Oleh itu, rayuan balas responden berhubung perkara ini ditolak.
- (4) Seksyen 76 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') memperuntukan bahawa aset perkahwinan yang boleh dibahagikan selepas pembubaran perkahwinan merupakan aset yang diperolehi sepanjang perkahwinan. Oleh itu, s. 76(1) merujuk pada 'sebarang aset yang diperolehi semasa perkahwinan melalui usaha kedua-dua pihak' manakala s. 76(3) merujuk pada aset yang diperolehi
- G sepanjang perkahwinan melalui usaha tunggal salah satu pihak. Berdasarkan fakta, rumah kedai di Melaka merupakan hadiah kepada perayu pertama. Oleh itu, rumah kedai tersebut tidak termasuk dalam aset perkahwinan. Dalam keadaan ini, s. 76(5) tidak terpakai pada hartanah ini.
- H (5) Hartanah yang diperolehi sebelum perkahwinan dan hartanah yang diwarisi semasa perkahwinan disumbang oleh unsur-unsur luar perkahwinan. Pasangan yang memperolehinya layak menyimpannya. Ini khususnya apabila s. 76(4)(a) Akta diambil kira. Memandangkan kondominium adalah hadiah daripada Tay How Seng kepada perayu
- I pertama, ia tidak boleh dikatakan sebagai aset perkahwinan, walaupun ia diperolehi oleh perayu pertama semasa dalam perkahwinan.

- (6) Hakim bicara khilaf apabila beliau mendapati responden layak menerima 50% daripada 380 saham Tong Ah Co Sdn Bhd. Jumlah 139 saham itu merupakan hadiah kepada perayu pertama apabila dia masih seorang kanak-kanak dan tidak boleh dijadikan sebagai aset perkahwinan. Jumlah 380 saham tersebut juga merupakan hadiah kepada perayu pertama di mana tidak terdapat transaksi kewangan untuk memindah milik kesemua 380 saham daripada Tay How Seng kepada perayu pertama. Kesemua 120 saham dalam Tay Miang Guan Sdn Bhd yang diberi kepada perayu pertama juga merupakan hadiah memandangkan tiada transaksi kewangan berlaku antara Tay How Seng dan perayu pertama. Dalam keadaan ini, rayuan perayu pertama dibenarkan dan rayuan balas responden berkenaan perkara ini ditolak. A B C
- (7) Saham dalam kedua-dua syarikat Express Management Services Sdn Bhd dan How Tiam Enterprise Sdn Bhd yang dipegang oleh perayu pertama adalah tidak bernilai memandangkan keduanya mengalami kerugian. Hujahan perayu pertama bahawa responden perlu menanggung kerugian yang dialami oleh kedua-dua syarikat ini tidak bermerit. Perintah pengagihan adalah semata-mata berkenaan saham dan tidak melibatkan hal perkara dalaman syarikat-syarikat ini berkaitan kerugian yang dialaminya. D

Case(s) referred to:

- Baheerathy Arumugam v. V Gunaselan V Visvanathan* [2013] 1 CLJ 954 HC (*refd*)
Barnes v. Barnes [1972] 3 All ER 872 (*refd*)
Butterworth v. Butterworth (1920) P126 (*refd*)
Chaw Anui v. Tan Kim Chai [2004] 1 LNS 260 HC (*refd*)
Cockburn v. Cockburn [1957] 3 All ER 260 (*refd*)
James Jemut Masing v. Fiona Frances Masing (F) nee Henderson [1994] 2 CLJ 390 HC (*refd*)
Leow Kooi Wah v. Philip Ng Kok Seng & Anor [1997] 1 LNS 419 HC (*refd*)
Lumsden v. Lumsden [1963] 5 FLR 388 (*refd*)
Menon v. Menon & Warth [1936] 1 All ER 900 (*refd*)
Roberts v. Roberts [1968] 3 All ER 479 (*refd*)
Shireen Chelliah Thiruchelvam v. Kanagasingham Kandiah; Sureshan Marcandan (Party Cited) (No 2) [2011] 1 LNS 1167 HC (*refd*)
White v. White [2000] 2 FLR 981 (*refd*)

Legislation referred to:

- Law Reform (Marriage and Divorce) Act 1976, ss. 52, 53, 54(1)(a), (b), (c), (d), 59, 76(1), (2)(a), (b), (c), (3), (4)(a), (5), 77(2), 78 H
- For the appellants - Jagjit Singh (Bhuvaneswari K & Akbardin Abdul Kader with him); M/s Jagjit Singh & Co*
For the respondent - V Malini; (Tan Kok Thong with her); M/s Nik Hussain & Partners

I

A [Appeal from High Court, Kuala Lumpur; Divorce Petition No: S8(S4)-33-1142-2001 (overruled)]

Reported by Kumitha Abd Majid

B JUDGMENT

Umi Kalthum Abdul Majid JCA:

[1] This is an appeal and cross-appeal against the order of *decree nisi* by the learned judge of the High Court dated 3 March 2011.

C [2] The first appellant herein was the then husband of the respondent/petitioner wife in the High Court. The second appellant was cited as the co-respondent in the High Court. For easy reference, parties will be referred to as they were at before us at the Court of Appeal.

Facts

D [3] The first appellant and the respondent were married on 4 November 1981 in Kuala Lumpur before the Registrar of Marriages.

E [4] The first two years of the marriage, the respondent and the first appellant lived in England as the first appellant was working in England as a management trainee. Thereafter the respondent and the first appellant lived in Butterworth for nearly two years where the first appellant worked as a general manager. Then, the couple moved to Kuala Lumpur and lived with the first appellant's parents in Taman Desa in Jalan Desa Ria for two years. Shortly after that, the parties stayed at No. 23 Lingkungan Hujan Taman OUG Old Klang Road, Kuala Lumpur which the first appellant rented from F his aunt. Thereafter, the parties moved out to their matrimonial home in 1991 which is a two storey bungalow house at No. 6 Lorong Desa Maju, Taman Desa, Batu 4 Jalan Kelang Lama, 58200 Kuala Lumpur.

G [5] There are two children from the union, namely Elaine Tay Siew Aun (f) born on 10 October 1989 and Elena Tay Siew Kuan (f) born on 22 October 1993.

H [6] The respondent referred her matrimonial difficulties to the Conciliatory Council/Marriage Tribunal on 6 April 2001. The Conciliatory Council/Marriage Tribunal met with the respondent on 10 May 2001 and with the first appellant on 5 July 2001 and had certified that the couple was unable to resolve their matrimonial difficulties.

I [7] The respondent led evidence that the breakdown of the marriage was caused by the intolerable and unreasonable behaviour of the first appellant. The first appellant had committed adultery with the second appellant at No. 30B-1 Faber Indah Apartment Block A, Jalan Desa Cantik, Taman Desa

Off Jalan Kelang Lama, 58100 Kuala Lumpur. The first appellant and the second appellant have two illegitimate children namely Tay Kim Yang born on 1 July 1998 and another child born on 3 December 2001. As a result of the said adultery, the respondent suffered emotional and mental torture and lost consortium with the first appellant.

[8] The respondent filed a petition for divorce pursuant to s. 53 of the Law Reform (Marriage and Divorce) Act 1976 (“the Act”) on 24 October 2001. The respondent applied for the following orders:

- (a) that the marriage be dissolved; A
- (b) that the respondent be granted sole guardianship, custody, care and control of the children of the family, namely Elaine Tay Siew Aun and Elena Tay Siew Kuan; B
- (c) that the first appellant be ordered to hand-over the children’s, namely Elaine Tay Siew Aun and Elena Tay Siew Kuan, passports to the respondent; C
- (d) that the first appellant be granted day access to the children of the family, from 11am to 7pm every alternate Sunday; D
- (e) that the first appellant be ordered to pay maintenance for the benefit of Elaine Tay Siew Aun and Elena Tay Siew Kuan in the sum of RM4,000 per month; E
- (f) that the first appellant be restrained until further order from entering the matrimonial home except with the respondent’s prior consent and from harassing, physical or emotional abuse of the respondent and the said children; F
- (g) for a declaration that the first appellant is the sole owner of the matrimonial house, No. 6 Lorong Desa Maju, Taman Desa, Batu 4 Jalan Kelang Lama, 58200 Kuala Lumpur and hold one-half share thereof on a constructive trust for the respondent; alternatively, that the first appellant and his father, Tay How Seng, hold the said matrimonial home on a constructive trust as to one-half share thereof for the respondent and as to one-half share thereof for the first appellant; G
- (h) that the first appellant be ordered to deliver and transfer the BMW 318i motorcar bearing registration no. WDD 28 free of encumbrances to the respondent; H
- (i) that the first appellant be ordered to reimburse the sum of RM2,000 being the medical expenses incurred by the respondent for Elena Tay Siew Kuan and any other medical and dental fees incurred after filing of petition until date of order; I

- A (j) that the first appellant be ordered to pay all medical, dental and hospitalisation fees including medical aids for the respondent and the said children;
- (k) that the respondent be awarded damages for adultery against the second appellant in the sum of RM4,000,000;
- B (l) that the first and second appellants be ordered to pay the costs of this suit; and
- (m) that the respondent be granted the following ancillary reliefs:
- C (i) that the first appellant be ordered to pay to the respondent maintenance pending suit in the sum of RM5,000 per month;
- (ii) that the first appellant be ordered to vacate the matrimonial home, No. 6 Lorong Desa Maju, Taman Desa, Batu 4 Jalan Klang Lama, 58200 Kuala Lumpur, and that the first appellant be ordered to procure for the respondent the right to continue residing at the said matrimonial home with the children of the family pending the determination of this suit;
- D (iii) that an equitable division of the matrimonial assets between the respondent and the first appellant be ordered;
- E (iv) that the first appellant be ordered to pay to the respondent maintenance in the sum of RM6,000 per month;
- (v) that any disposition of matrimonial property that the first appellant has made within the preceding three years, with the object of reducing his means to pay maintenance to the petitioner and the children of the family or which deprives the petitioner of any right to such property be set aside; and
- F (vi) any other or further reliefs that the Honourable Court deems fit and proper.
- G [9] In response, the first appellant applied for the following orders:
- (a) that marriage between the first appellant and the respondent be dissolved;
- H (b) that in general, the respondent be given the general custody, care and control of the children of Elaine Tay Siew Aun and Elena Tay Siew Kuan and the first appellant be given equal rights in respect of the education, health and religion of the children;
- (c) that the first appellant be given daily access to children for the days and times as follows:
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- (i) from 11am to 9pm every alternate Sunday and if there is any cancellation for any reason, it must be replaced at the earliest opportunity; A
- (ii) public holidays;
- (iii) school holidays; B
- (iv) Chinese New Year's eve and the first and/or second day of the Chinese New Year and the 15th day of the Chinese New Year;
- (v) "Memorial Prayers", "All Souls Day (Cheng Meng), Dragon Boat Festival, Hungry Ghost-Festival, Moon Cake Festival and Chinese Last Festival of the Lunar Year"; C
- (vi) "Father's Day";
- (vii) birthday celebrations and the anniversary of the death of family members who are close and important days for the family; D
- (viii) compassionate days and other events that require the presence of children;
- (d) upon the children reaching the age of 18 years old, they are free to choose whether or not to stay with the first appellant or the respondent at any time; E
- (e) that the respondent allows the children to make telephone calls and speak to the first appellant at any time they wish;
- (f) that the first appellant be given the right to access to the children by telephone every day from 9.45pm to 10pm; F
- (g) the first appellant pays maintenance of RM3,500 per month to the respondent and a reasonable amount of not more than RM2,000 per month for each child to be paid directly into the account of the respondent;
- (h) the respondent bears all expenses if the expenditure is in excess of the amount of maintenance paid by the first appellant under para. (g) above; G
- (i) the following assets are not matrimonial assets and cannot be divided and given to the respondent:
 - (i) a house at No. 6, Lorong Desa Maju, Taman Desa, Jalan Kelang Lama, 58200 Kuala Lumpur together with the land on which the house was built, that is, HS (D) 4553, PT No. 1622, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan; H
 - (ii) land held under Lot 43704, PN 2833, Mukim Kuala Lumpur;
 - (iii) one share in Ban Yeang Food Industries Sdn Bhd; I

- A (iv) 10,000 shares in Usaha Permai Sdn Bhd;
(v) 60,000 shares in How Tian Enterprise Sdn Bhd;
- B (j) other assets other than those specifically mention in prayer (i) above as may be determined by the court to be matrimonial assets be divided between the first appellant and the respondent and the respondent be given not more than one-third (1/3) of such assets;
- C (k) that if any shares in Associated Asia Marketing Sdn Bhd is to be divided and is to be given to the respondent as matrimonial asset, the respondent be prevented from selling, transferring or dispose of the shares in any other manner at any time;
- D (l) that the proceeds of the sale of the BMW 318i car with registration no. WDD 28 which was acquired by the respondent shall be paid to the first appellant or in the alternative be divided between the first appellant and the respondent and that the respondent be given not more than one-third (1/3) of the proceeds;
- E (m) that the first appellant be given custody of the children's passports and the respondent may obtain the said passports from the appellant when going abroad with the children but must be returned to the appellant upon returning from abroad; and
(n) that the respondent pays the legal costs.

High Court

- F [10] The parties had agreed to resolve the issue of the distribution of some of the disputed properties of the marriage in accordance with a list of assets dated 13 January 2011 and marked as encl. 319 (see pp. 11 to 15, grounds of judgment, RRT). From the said list, some of the immovable assets were agreed to be shared and divided equally between them; the respondent had abandoned some of her claims for the shares in some of the companies listed; in respect of the vehicles, the parties confirmed the issue has been resolved.
- G Therefore, the only issues left pertained to the assets referred to below and the issues of damages and maintenance to be awarded to the respondent.

[11] On 3 March 2011, the High Court allowed prayer (a) of both the first appellant's and the respondent's claims and ordered that:

- H (i) the marriage be dissolved and be made absolute immediately;
(ii) the respondent be given the guardianship, custody, care and control of the children;
- I (iii) the first appellant to pay maintenance of RM1,000 every month beginning from 1 July 2010 for the children until they reach 18 years of age;

(iv) the first appellant to pay maintenance in the sum of RM4,000 per month to the respondent beginning from 1 July 2010; and A

(v) payment of RM100,000 by the second appellant as damages to the respondent.

[12] The learned trial judge made further orders in essence on the following assets. B

Immovable Property Assets

[13] The first appellant shall give 50% of the following immovable properties to the respondent: C

(i) HSD 4533, PT No. 1622, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan (known as Taman Desa Property);

(ii) HSD 14053 to 14106, PT No. 984 to 1037 in Daerah Melaka Tengah, Melaka at EG-10, Ground Floor, Blok E, Bayumas Phase 1, Tengkeria Utama, Melaka (known as Melaka Shop Lot); and D

(iii) HSD 4767, PT No. 1837, Mukim and Daerah Kuala Lumpur, Wilayah Persekutuan (known as Faber Indah Condominium).

[14] The first appellant and the respondent had agreed on equal division, that is, 50% to each party in respect of HSD 105261 PT No. 13140 Mukim Setul Daerah Seremban, Negeri Sembilan. E

[15] The first appellant and the respondent to maintain their respective shares in D3-3A, No. Bangunan D, Parcel No. C/O D3-3A, Mukim Kuala Lumpur, Wilayah Persekutuan.

[16] The first appellant had agreed to give to the respondent 50% of the value of the property HSD 51929, PT No. 994, Mukim Petaling, Wilayah Persekutuan. F

[17] The respondent's claim to immovable property HSD 41089, PT No. 43704, Mukim Kuala Lumpur, Daerah Wilayah Persekutuan (known as Old Klang Road property) was dismissed. G

Shares In Companies In Malaysia

[18] The first appellant to value 380 of his shares in Tong Ah Co Sdn Bhd and shall give to the respondent 50% of the said valuation. H

[19] The first appellant to value 120 of his shares in Tay Miang Guan & Co Bhd and shall give to the respondent 50% of the said valuation.

[20] The first appellant shall give 50% of the value of his shares in the following companies to the respondent: I

- A (i) 16,000 shares in Express Management Services Sdn Bhd; and
(ii) 60,000 shares in How Tian Enterprise Sdn Bhd.

Shares In Companies In Singapore

- B [21] The first appellant to give to the respondent 50% of S\$35,000 which was received by the first appellant as capital distribution from Tay Miang Huat Pte Ltd (Singapore).

[22] The respondent's claim to the shares owned by the first appellant in Tay Miang Huat Distillery Private Limited was dismissed.

- C *Savings And Contributions Of The First Appellant*

[23] The first appellant shall give 50% of his savings as at the date of order in account no. 022-006736-2 in DBS Bank Ltd (Singapore) to the respondent.

- D [24] The first appellant shall give to the respondent 50% of his contributions in Employees Provident Fund as at the date of the order when his contributions can be withdrawn by the first appellant.

[25] Costs shall be borne by the first appellant.

Taman Desa Property

- E [26] The learned trial judge found that this property belongs to the first appellant and the third party each holding an equal 1/2 share thereof. The said property also happened to be the matrimonial home of the disputing couple. The respondent is legally entitled to a share of it. Accordingly, the first appellant's half share in the said property be equally shared with the respondent as guided by the principles laid down in *White v. White* [2000] 2 FLR 981.

Faber Indah Condominium

- G [27] The first appellant claimed that the said property was a gift to him by his father and as such it does not form part of the matrimonial property. On the issue of whether a gift to a spouse forms part of the matrimonial asset, the learned trial judge inclined to be bound by the views expressed by the learned judge in *Chaw Anui v. Tan Kim Chai* [2004] 1 LNS 260; [2004] 5 AMR 671 and held that even if the above said property was a gift to the first appellant, it does not escape from being a matrimonial asset. It is subject to distribution. It is trite that the respondent as a housewife contributed to the welfare of the family by looking after the home or caring for the family within the meaning of s. 76(4)(a) of the Act. She is entitled to a share of the property even though the asset was acquired by the sole effort of the first appellant or was a gift to the first appellant. Accordingly, the respondent is entitled to half share of the same based on the equation as agreed to between the parties in respect of the other immovable assets.

Melaka Shop Lot

A

[28] As for the immovable asset described as the Melaka Shop Lot, it was conceded by the respondent that the said shop Lot was a gift to the first appellant. The third party acquired the property in 1992 and assigned the same to the first appellant in December 1996. For the same reason as stated in respect of the Faber Indah Condominium above, the court held that this is a matrimonial asset which would be distributed in the same equation of 50 - 50 between the respondent and the first appellant.

B

Old Klang Road Property

[29] This piece of land was purchased by the first appellant's mother in 1982 and was registered in the name of the first appellant and one Tay Chong Tiang. On 4 June 1983, the first appellant transferred his share in the same to Tay Chong Tiang who then subsequently disposed it off on 11 July 2006. It was crystal clear that at the time the property was disposed off by the said Tay Chong Tiang, the first appellant had no interest whatsoever, and therefore does not form part of the matrimonial asset of the first appellant. That being so, the respondent's claim in prayer (v) of the ancillary reliefs in para. (m) of the petition was without any merit and was disallowed.

C

D

Shares In Tay Miang Huat Pte Ltd

[30] The learned trial judge agreed that this is a family company and any money returned to the first appellant should rightly belong to him alone. On the evidence available, the court decided that the respondent's claim for distribution of the money must be allowed.

E

Syarikat Tong Ah Co Sdn Bhd

F

[31] The first appellant has 519 shares in the above said company. Out of this, 139 shares were acquired in 1963 when he was only six years old as a gift from his father. In the light of this, the said number of shares ought to be deducted from the amount and cannot be deemed as a matrimonial asset. The balance of the shares shall be subject to distribution between the respondent and the first appellant as a matrimonial asset, equally.

G

Tay Miang Guan & Co Bhd

[32] The first appellant owned 206 shares in this company and out of this, 86 shares were acquired in 1965 when he was eight years old by way of gift from his father. The evidence further disclosed that 34 shares were transferred to the first appellant by his father in 1997 and another 86 shares were acquired between 1990 - 1993. The learned trial judge rejected the first appellant's contention that these shares were gifts and they were not matrimonial assets. The court found that a gift acquired during marriage

H

I

- A constitutes a matrimonial asset and is subject to distribution upon divorce. The 86 shares acquired when he was a boy of eight years ought to be deducted as they were not part of the matrimonial assets.

- [33] The memorandum and articles of association of Syarikat Tong Ah Co Sdn Bhd and Tay Miang Guan & Co Bhd contain restrictions as to the transfer of its shares. The memorandum and articles of association of the said companies limit the share ownership of the company to the descendants of the founder members of the company. The articles also provide that the directors of the company have absolute discretion to refuse to register any proposed transfer of shares. In the case of Tay Miang Guan & Co Sdn Bhd, the restriction on the transfer of shares is even more restrictive in that the company shares are restricted to only the male descendants of the founder members.

- [34] The learned trial judge concluded that from the evidential view point, the memorandum and articles of association of both companies are not before the court. Both are contained in bundle Y which is not an agreed bundle of documents. Learned counsel for the respondent raised objections on the admissibility of these documents as they are not properly tendered in court. Hence, the court was precluded from considering these documents and gives any evidential value to it. The court held that being a family court, it has wide powers under s. 52 of the Act to grant and make the necessary order as the justice of the matter requires. In the circumstances of the case, the restrictions contained in the memorandum and articles of association of the two companies cannot bind the hands of the court to accord justice to the affected party.

- F *Associated Asia Marketing Sdn Bhd*
Usaha Permai Sdn Bhd
Express Management Services Sdn Bhd
How Tian Enterprise Sdn Bhd

- G [35] The learned trial judge found that the assets of these four companies were never contested as matrimonial assets. The court therefore found that they are matrimonial assets and ordered the assets to be equally divided between the respondent and the first appellant.

- H [36] The court further ordered that a new valuer shall be appointed for the purpose of determining the value of the assets of all the shares in all the companies and the immovable properties which the court had ordered to be distributed between the parties.

- I

Savings And Contributions

A

[37] The learned trial judge also found that the first appellant's savings in the DBS Bank (S'pore) account and the EPF also form part of the matrimonial assets and as such shall be divided equally between the parties.

Maintenance

B

[38] The respondent claimed a sum of RM6,000 per month for her maintenance, while the first appellant was only prepared to provide the sum of RM3,500 per month and a sum of not more than RM2,000 for each of the children.

[39] The first appellant had suffered a stroke in 2009 and is severely disabled with a total loss of speech and paralysed on the right side of the body. A guardian *ad litem* had been appointed to represent him and gave evidence as R1. In her evidence, R1 testified that the first appellant's earnings come solely from the dividends from the companies which is in the region of about RM10,330 per month. Further, the first appellant has to incur medical bills, constantly has to go for physiotherapy and massage which cost an average monthly expenditure of about RM2,848. The second appellant had corroborated the testimony of R1 on the medical requirements of the first appellant.

C

D

[40] The respondent testified that the average income of the first appellant is about RM50,000 derived from dividends from the various companies. The respondent's evidence was supported by the evidence of PW6, who is a company secretary and who gave evidence on the performance of Tong Ah Co Sdn Bhd.

E

[41] The learned trial judge referred to s. 78 of the Act in deciding what is the proper amount of maintenance to be awarded by the court and on the principle as enunciated on the case of *Lumsden v. Lumsden* (1963) 5 FLR 388, that the respondent/petitioner ought to be placed in a position to enjoy the same standard of living as she had during the existence of the marriage.

F

[42] The learned trial judge considered the totality of the evidence before him on the needs of the respondent and the earning capacity of the first appellant and made a finding that the first appellant still has a good earning capacity from the dividends, bonuses, fees, commissions and gratuities of the companies which he is a shareholder and director. That the source of income of the first appellant has not changed much which is mainly from the two companies Tong Ah Co Sdn Bhd and Tay Miang Guan Sdn Bhd. Only his health has changed for the worse. The first appellant also owns the various landed properties referred to earlier. The learned trial judge therefore concluded that it is highly improbable for the first appellant's income to be only in the region of RM10,000 a month. That the first appellant's income

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A is much more than that. The learned trial judge then awarded RM4,000 per month as being a reasonable sum for the maintenance of the respondent, and RM1,000 per month for the maintenance of one child (who is below 18 years old) until she reaches the age of 18 years (the other child had already attained 18 years of age).

B *Damages*

[43] The respondent claimed damages against the second appellant as co-respondent in the sum of RM4 million. The respondent's claimed that as a result of the first appellant's adultery she has suffered emotional and mental stress and has been financially deprived.

C [44] The second appellant had admitted adultery since 1977 but claimed that the respondent was fully aware of the relationship. The second appellant had socialised with the respondent and the respondent had been to her house and both of them attended a wedding dinner of the first appellant's sister. The second appellant's relationship with the respondent only turned sour after the second appellant's pregnancy. The second appellant testified that she was not the cause of the breakdown of the marriage and that the respondent had condoned the adultery. The second appellant stated that she was not the cause of the breakdown of the marriage and that the respondent had condoned the adultery. The second appellant stated that she is unemployed and currently taking care of the incapacitated first appellant, and any damages awarded against her would come from the first appellant's earnings from the dividends, which she pleaded is insufficient to even meet the monthly expenses of the first appellant.

F [45] The learned trial judge viewed the commission of adultery as a serious matrimonial offence and accepted the fact that the respondent has suffered both financially and spiritually. He found that the respondent is entitled to damages; there is no evidence that the respondent had connived or condoned the act of adultery by the first appellant to disentitle her to claim damages.

G [46] The learned trial judge referred to *Butterworth v. Butterworth* (1920) P126, *Leow Kooi Wah v. Philip Ng Kok Seng & Anor* [1997] 1 LNS 419; [1997] 3 MLJ 133 and *Menon v. Menon & Warth* [1936] 1 All ER 900 on assessment of damages against an adulterer. He came to the finding that the sum of RM100,000 as damages against the second appellant as reasonable. The claim by the respondent for RM4 million was found to be far too excessive bearing in mind that whatever amount of compensation to be awarded against the second appellant would eventually comes from the first appellant's coffers. Moreover, the second appellant is now living with the first appellant and taking care of him and had borne the first appellant's two children.

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The Appeal

[47] Before us, the appellants are appealing against the judgement of the learned trial judge on the following orders:

- (i) payment of maintenance in the sum of RM4,000 per month to the respondent by the first appellant;
- (ii) payment of damages for adultery amounting to RM100,000 to the respondent by the second appellant;
- (iii) distribution of three immovable properties namely the Taman Desa Property, Melaka Shop Lot and Faber Indah Condominium; and
- (iv) distribution of shares in Tong Ah Co Sdn Bhd, Tay Miang Guan & Co Sdn Bhd, Express Management Services Sdn Bhd and How Tian Enterprises Sdn Bhd.

[48] The respondent in her cross-appeal raised the following issues:

- (i) that the half share of the first appellant's ownership in Taman Desa property should be given to the respondent;
- (ii) the monthly maintenance of RM6,000 is to be given to the respondent and RM2,000 is to be given to the daughter Elena Tay Siew Kuan;
- (iii) the number of unit of shares owned by the first appellant in Tong Ah Co Sdn Bhd in which the respondent is given 50% should be 519 without leaving out the number of units alleged to be gifted to the first appellant by his father/third party when he was a six years old boy;
- (iv) half of the first appellant's shares in Tong Ah Co Sdn Bhd and Tay Miang Guan & Co should be transferred to the respondent, if possible, or the first appellant be ordered to hold the said shares on trust for the two daughters in equal shares; and
- (v) damages for adultery amounting to RM100,000 is not fair and it should be RM4 million.

Maintenance

[49] Learned counsel for the appellants submitted that the learned trial judge, in awarding RM4,000 per month as maintenance to the respondent, had erred in law in failing to consider s. 77(2) and s. 78 of the Act. Section 77(2) of the Act provides that the respondent can be ordered to pay maintenance to the first appellant husband where he is wholly incapacitated from earning a livelihood by reason of ill health. Section 78 provides that in determining the amount of maintenance to be paid by the first appellant to the respondent, the court must base its assessment on the means and needs of the wife/respondent, and the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

- A [50] In general, the first appellant highlighted that the learned judge failed to take into consideration that the first appellant's responsibility to maintain his second family consisting of the second appellant and his two sons now age 11 and 14 years, the respondent's earning capacity and the first appellant's physical condition.
- B [51] The first appellant suffered a massive stroke in June 2009. Based on a report dated 21 July 2007, the Consultant Neurologist, Dr Lee Foo Chiang stated that the first appellant was severely disabled by the major stroke with total loss of speech and dense right sided paralysis. The first appellant is not able to undertake any gainful employment, not possible to perform cognitive task including speech, calculation or comprehension. The prognosis for recovery from the stroke was poor. In another report, the Consultant Neurologist, Dr KJ Goh stated that the first appellant was mute, unable to speak or follow commands fully. It is unlikely that there will be any meaningful recovery.
- C
- D [52] Learned counsel for the appellants submitted that the monthly expenses of the first appellant is a total sum of RM16,150 and the first appellant has absolutely no sources of employment. The first appellant was an employee in Tay Miang Guan & Co Sdn Bhd. After his stroke, the first appellant was medically boarded out. Consequently, the first appellant does not receive any salary from the company. The first appellant's only source of income is from the dividends from Tong Ah Co Sdn Bhd and Tay Miang Guan & Co Sdn Bhd. For the year 2011, the first appellant was paid RM77,850 as dividends from Tong Ah Co Sdn Bhd and RM15,450 as dividends from Tay Miang Guan & Co.
- E
- F [53] The first appellant submitted that by consent, both parties have received 50% of the Desa Petaling Shop Lot valued at RM600,000, 50% of Country Heights (Country Home) valued at RM200,000, 50% of Desa Villa Condominium valued at RM230,000.
- G [54] Learned counsel for the appellants further submitted that the learned judge has also failed to take into consideration the earning capacity of the respondent in awarding a sum of RM4,000 per month as maintenance to the respondent. The respondent will be receiving additional rental income from the 50% apportionment of the matrimonial assets.
- H [55] Therefore with an income of RM7,775 per month in 2012, and with a second family to maintain coupled with the heavy monthly medical expenses, the first appellant is in no position to pay any maintenance to the respondent.

I

[56] The respondent in response submitted that, *vide* an interim order dated 8 September 2008, the first appellant was directed to pay the respondent a sum of RM5,000 per month and RM2,000 maintenance each for both their children amounting to RM4,000. The first appellant was complying with the court order until he suffered a stroke and fell ill in July 2009. Subsequently, the first appellant made an application for variation of the maintenance order for the respondent/wife and two children in June 2010. On 3 March 2011, the High Court varied the maintenance sum and ordered a sum of RM4,000 to be paid as maintenance for the respondent and RM1,000 to be paid for the second child only as the first child had attained the age of 18, to take effect from 1 July 2010. The learned judge directed that the interim order for RM9,000 to run from July 2009 (date the first appellant fell ill) to June 2010 (date of first appellant's application for variation of the maintenance order). The total sum of arrears as at March 2011 is RM153,000. Therefore, the total amount of arrears due to the respondent was RM173,000 and still accruing. No attempt was made by the first appellant or the guardian *ad litem*/next friend Tay Lee Joo to settle this sum until today.

[57] The respondent submitted that in assessing the amount of maintenance to be paid by a man to his wife or former wife, "the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage (s. 78 of the Act)

[58] In assessing the means and needs of the parties, the court has always had regard to the duration of the marriage, whether there were any children of the marriage, the age of the parties, whether the husband/first appellant had financially supported the wife during the duration of their marriage, the parties earning capabilities and whether the divorce would have affected the first appellant/husband's position financially. The respondent in her cross-appeal is seeking maintenance of RM6,000 per month and RM2,000 as maintenance for the second child.

[59] We agreed with the submission of learned counsel for the first appellant and allowed the first appellant's appeal on maintenance. The sum of RM4,000 is reduced to RM2,000 per month. We were of the view that the learned trial judge had failed to fully appreciate the fact that the first appellant is not in the position to be gainfully employed, is incurring high expenditure in medical bills and recuperative costs, has the second appellant and a second family to support where the two children of the second family are young in age (see *Barnes v. Barnes* [1972] 3 All ER 872; *Cockburn v. Cockburn* [1957] 3 All ER 260; *Roberts v. Roberts* [1968] 3 All ER 479), is

A earning income from dividends of the two companies Tong Ah Co Sdn Bhd and Tay Miang Guan Co Sdn Bhd. Even though the first appellant has immovable properties to his name, but so does the respondent. The way as we saw it, the respondent has some means to support herself and cannot be said to be in destitute.

B [60] As for the responsibility for the breakdown of the marriage, we found that the learned trial judge has erred when he held the first appellant to be solely responsible. Facts had shown that the respondent knew that the second appellant was an employee of Associated Asia Marketing Sdn Bhd, a company which belonged to the first appellant; in 1996 the respondent was suspicious of the relationship between the first and the second appellants; in September 1997, the respondent knew the second appellant was pregnant (p. 145, vol 1 RR); on 1 July 1998, the second appellant delivered a baby boy; in 1999 the first appellant and the respondent had sex (p. 147, vol 1 RR); in March 2001, the second appellant was pregnant with the second son; it was only on 24 October 2001 that the respondent filed the divorce petition; in December 2001, the second appellant's second son was born; on 16 September 2003 the respondent filed the amended divorce petition; on 13 January 2011, hearing of the petition commenced in the High Court. These facts served to show that there was a certain amount of condonation of the adulterous relationship between the first and second appellants by the respondent.

E [61] As such, while we were fully aware of the principles of law applicable in determining the amount of maintenance to be awarded to the respondent, including the right of the respondent to maintain her standard of living, we thought it fit to compel the first appellant to at least pay a reasonable sum as maintenance for the upkeep of the respondent. Hence, we had reduced the maintenance from RM4,000 to RM2,000 per month.

F

Damages

G [62] On RM100,000 damages awarded to the respondent to be paid by the second appellant, the second appellant submitted that that the learned trial judge had erred in awarding the said sum on the ground that the first appellant and the respondent had agreed to the divorce pursuant to s. 53 of the Act. There was no finding of fault against either party. Learned counsel for the second appellant submitted that the respondent had condoned the adultery. The learned trial judge had failed to make a finding on the issue of condonation of adultery by the respondent. The learned trial judge has to make an enquiry into the facts and circumstances causing or leading to the breakdown of the said marriage, that is, the adultery. The second appellant submitted that facts showed that the respondent had condoned the adultery (see para. 60 above).

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[63] Therefore, based on these facts the appellants submitted that the learned trial judge when making the order dissolving the marriage would have done so based on the second ground raised by the respondent in para. 12 of the amended petition, that the first appellant had behaved in such a way that the respondent could not reasonably be expected to live with the first appellant.

A

[64] The appellants also submitted that there can be no award for damages for adultery when the reason for the breakdown of the marriage was pursuant to s. 54(1)(b) of the Act, that the first appellant had behaved in such a way that the respondent cannot reasonably be expected to live with the first appellant.

B

[65] Section 59 of the Act states that damages may be awarded where the sole ground was adultery which is in s. 54(1)(a) and no damages can be awarded where the ground for divorce falls under s. 54(1)(b), s. 54(1)(c) or s. 54(1)(d) of the Act.

C

[66] In the alternative, in the event that we were not agreeable to the above submission, the appellants submitted that the award of RM100,000 as damages against the second appellant was manifestly excessive.

D

[67] Learned counsel for the first appellant submitted the learned trial judge had failed to take into consideration that the respondent could not and did not have any male children, the consequence of which the first appellant's family shares could not be transferred by the first appellant within his own heirs.

E

[68] Therefore, the appellants submitted that based on the aforesaid reasons, damages awarded should not be punitive but nominal and further suggested that damages in the sum of RM25,000 is fair, reasonable and adequate.

F

[69] The respondent in her cross-appeal, on the other hand, requested for the sum of RM4 million to be awarded to her as damages against the second appellant. However, before us, the respondent prayed for the sum of RM100,000 be maintained for damages against the second appellant.

G

[70] The respondent claimed damages against the second appellant because of her adultery with the first appellant which had caused the break up of her marriage and caused her and the children much pain and suffering. The respondent suffered loss of consortium of husband and wife and loss of financial benefits. In addition to that, the respondent had been with the first appellant at the time when he was working in England as the management trainee and therefore with little means, and the respondent helped the first appellant to maintain the household. The respondent's feelings and emotions have been severely injured because of this act of adultery and she found it

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A intolerable to live with the first appellant. The first appellant and second appellant have an illegitimate child born on 1 July 1998 and they are still continuing in their adulterous relationship. To add insult to the respondent's feelings, they also have a second illegitimate child.

B [71] Learned counsel for the respondent also submitted that the respondent's condonation of the act of adultery was not proven and it was ridiculous. There are two children born of the adulterous relationship. In the case of *Leow Kooi Wah v. Philip Ng Kok Seng & Anor* [1997] 1 LNS 419; [1997] 3 MLJ 133, the man was a salesman and the person ordered to pay damages was a clerk and the sum awarded was RM50,000.

C [72] The respondent appealed that in view of the first appellant's financial status and the second appellant's actions they should pay substantial damages to the respondent.

D [73] As we had found earlier, based on the facts of this case, we found that there was condonation on the part of the respondent to the acts of adultery by the appellants. We therefore accepted the suggested sum by the appellants as being reasonable and reduced the amount of damages to RM25,000.

Assets Distribution

E [74] On distribution of matrimonial assets, the main issues for us to decide as submitted by parties can be summarised as follows:

- (i) whether the assets were matrimonial assets?;
- (ii) whether the assets were gifts made to the first appellant?; or
- F (iii) whether the gifts can constitute matrimonial assets?

Before us, learned counsel for the first appellant raised these issues in respect of only three immovable assets, namely, the Taman Desa Property, the Melaka Shop Lot and the Faber Indah Condominium.

G [75] Learned counsel for the first appellant submitted that matrimonial assets as stated in s. 76(1) of the Act must be assets acquired by both the husband and the wife, during the course of the marriage and acquired by the joint efforts of both the parties. Under s. 76(2) of the Act, when making an order as to the division of the matrimonial assets, the court must have regard to the extent of contributions made by each party towards acquiring that matrimonial asset, any debts incurred by either party for their joint benefits and the needs of the minor children, if any, of the marriage. Subject to the above considerations, the court shall only then be inclined towards equality of division of the matrimonial assets. The court should not award a blanket equality of division of matrimonial assets without first having regard to the considerations as set out in s. 76(2)(a), (b) and (c) of the Act.

I

[76] Reference was made to the case of *James Jemut Masing v. Fiona Frances Masing (F) nee Henderson* [1994] 2 CLJ 390, Justice Chong Siew Fai had set out the legal position at p. 392 as follows: A

Law on division of assets

For the division of properties acquired during the marriage, the law divides them into 2 categories: B

- (1) assets acquired by the couple by their joint efforts;
- (2) assets acquired by the sole effort of one party to the marriage.

For category (1) i.e. assets acquired by joint efforts of the couple, the Court shall lean towards equality of division subject, however, to the following factors for consideration: C

- (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (b) any debts owing by either party which were contracted for their joint benefit; D
- (c) the needs of the minor children of the marriage.

For category (2) i.e. assets acquired by the sole effort of one party to the marriage, the Court may divide the assets in such proportions as it thinks reasonable, regard to be had to the following considerations: E

- (a) the extent of the contributions made by the other party who did not acquire the assets, to the welfare of the family by looking after the home and caring for the family;
- (b) the needs of the minor children of the marriage; F

Provided, however, that in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

The Court may, instead of dividing the assets, order the sale of such assets and the division of the proceeds of sale between the parties.

[77] Reference was also made to another case of *Baheerathy Arumugam v. V Gunaselan V Visvanathan* [2013] 1 CLJ 954; [2012] 5 AMR 771, where Justice Yeoh Wee Siam said at p. 983 (CLJ); p. 796 (AMR) as follows: G

The guiding principle under s. 76 (2) of the LRA is for the court to incline towards equality of division of the matrimonial assets if both parties have acquired the asset by their joint efforts. H

[78] Therefore, learned counsel for the first appellant submitted that s. 76(2) is clearly settled law in that the matrimonial assets must be acquired after marriage by the joint efforts of husband and wife before the court can be inclined toward equality of division of matrimonial assets. I

- A [79] On gifts acquired before marriage, learned counsel for the first appellant submitted that assets acquired by way of family inheritance or gifts before marriage, do not form matrimonial assets and do come within purview of s. 76(1) of the Act. Reference was made to the case of *Shireen Chelliah Thiruchelvam v. Kanagasasingam Kandiah; Sureshan Marcandan (Party Cited) (No 2)* [2011] 1 LNS 1167; [2012] 2AMR 156, where Justice Yeoh Wee Siam said at p. 161 as follows:
- B

This property was purchased by the RH on December 19, 1989 for RM90,000, before the marriage of the RH to the PW.

- C The PW is not entitled to any share of this property, including the rent.
- [80] Similarly, it was submitted, that family inheritance and gifts after marriage do not constitute matrimonial assets as set out in s. 76 of the Act as:
- (i) the family inheritance and gifts are not acquired by the joint efforts of the first appellant and the respondent (s. 76(1));
- D (ii) the family inheritance and gifts are not acquired by way of money or work contributed solely by the respondent (s. 76(2)(a));
- (iii) the family inheritance and gifts are not substantially improved by the sole effort of the respondent (s. 76(5)).

- E [81] Based on his submission, learned counsel for the first appellant then went on to submit on the three immovable properties in questioned.

Immovable Property

Taman Desa Property

- F [82] We found that from the facts of this case this property was purchased by the first appellant's father Tay How Seng and Tay Chong Tiang from Faber Union Sdn Bhd. Payments were made by the father Tay How Seng.
- G [83] In 1983, on the instructions of the Tay How Seng, Tay Chong Tiang transferred his 1/2 share in the property to the first appellant. On 4 June 1983, the first appellant confirmed that in consideration of Tay Chong Tiang's transferring Tay Chong Tiang's 1/2 share in this property to the first appellant, the first appellant in return transferred his 1/2 share in Property No. HS (D) 41089, PT No. 43704 in the Mukim and District of Kuala Lumpur to Tay Chong Tiang. There was no money transaction during this change of ownership of property.
- H [84] In 1986, Tay How Seng commenced a construction of a bungalow on the said land. In 1990, Tay How Seng conducted renovation works on the said bungalow. In May 1991, the first appellant and the respondent moved to live in the bungalow. Tay How Seng also stays in this property, he has
- I

the house keys and the remote control to the gate. Tay How Seng also held a few functions and gatherings in this bungalow. Tay How Seng's antique furniture was also placed in the bungalow.

[85] The first appellant submitted that his 1/2 share which he had acquired in 1983 was not acquired by the joint efforts of the first appellant and the respondent and therefore it is not a matrimonial asset. The appellant's counsel submitted that there were no contributions whatsoever made by the respondent as set out in s. 76(2)(a). Furthermore, the learned judge had erred in apportioning the first appellant's half share on a 50:50 basis as between the first appellant and the respondent.

[86] In the circumstances of this case, especially the fact that the 1/2 share acquired by the first appellant was in exchange for the first appellant's 1/2 share in the property No. HS(D) 41089, PT No. 43704, Mukim and District of Kuala Lumpur, we agreed with the first appellant's submission that the first appellant's half share to this house was acquired by the first appellant without any contribution from the respondent. Therefore, the first appellant's half share to this property is not a matrimonial property, notwithstanding the fact that it also happens to be the matrimonial home of the first appellant and the respondent. The learned trial judge had erred in so ruling otherwise. We, however, at the same time affirmed the finding of the learned trial judge that the said property belongs to the first appellant and his father/Tay How Seng in equal 1/2 share thereof and dismiss the respondent's cross-appeal to this extent. We do not see any merits in the respondent's cross-appeal.

Melaka Shop Lot

[87] This property was acquired by Tay How Seng on 18 December 1992. He bought it from the vendor Mahajaya Property Sdn Bhd. By a deed of assignment dated 20 January 1997, Tay How Seng assigned this property to the first appellant by reason of natural love and affection. The first appellant submitted that this property was a gift and the learned trial judge had erred when he came to a finding that although the Malacca Shop Lot was a gift to the first appellant, this property was a matrimonial asset and accordingly in following the 50:50 equation the learned trial judge awarded the respondent a half share in the said shop lot.

[88] We allowed the first appellant's appeal on this aspect by reason of the fact that the shop lot was a gift to the first appellant in 1997, that is, before the marriage was solemnised on 4 November 1981. Therefore, the shop lot does not form part of the matrimonial assets. Section 76 of the Act provides for the division of matrimonial assets as follows:

A 76 Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets **acquired by them during the marriage** by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

B (2) In exercising the power conferred by subsection (1) the court shall have regard to -

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

C (b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court shall incline toward equality of division.

D (3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of **any assets acquired during the marriage** by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

E (4) In exercising the power conferred by subsection (3) the court shall have regard to -

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

F (b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

G (5) For the purposes of this section, reference to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

H (emphasis added)

It was clear to us that by virtue of the provisions of s. 76 of the Act, matrimonial assets capable of being ordered to be distributed upon a divorce being granted are assets acquired during the marriage. Hence, s. 76(1) makes reference to “any assets acquired by them during the marriage by their joint

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efforts”, whilst s. 76(3) makes reference to “any assets acquired during the marriage by the sole effort of one party”. We do not see the application of s. 76(5) in respect of this property. But see our reasoning in para. 78 below as to why the respondent was not entitled to half of its value.

Faber Indah Condominium

[89] This condominium was owned by Express Builders Sdn Bhd, which was a private limited company incorporated on 15 September 1982. Tong Ah Co Sdn Bhd was one of the five shareholders of Express Builders Sdn Bhd. There were only two directors of Express Builders Sdn Bhd, namely the Tay How Seng and the first appellant, both of whom were not shareholders of Express Builders Sdn Bhd. By a circular resolution dated 2 October 1984, Express Builders Sdn Bhd, agreed to sell its investment in this condominium unit. This circular resolution was signed by the Tay How Seng and the company secretary. Some ten years later by a sale and purchase agreement dated 18 November 1994, Express Builders Sdn Bhd sold the said condominium to the first appellant for the purchase price of RM165,837. By a Pacific Bank Berhad Cheque No. 654981 dated 23 November 1994, Tay How Seng paid the entire purchase price of RM165,837 to the first appellant. By a Chase Manhattan Cheque No. 306351 dated 24 November 1994 the first appellant then issued a cheque for RM165,837 to Express Builders Sdn Bhd. The first appellant submitted that in view of the aforesaid facts, it is abundantly clear that this condominium was purchased by the Tay How Seng.

[90] It was also submitted that the learned trial judge had erred in law when he came to the conclusion that the condominium was still a matrimonial asset and subject to a 50:50 distribution notwithstanding the finding of fact by the learned judge that it was a gift to the first appellant by Tay How Seng.

[91] We allowed the first appellant’s appeal on this aspect on similar basis as that for the Melaka Shop Lot, that is, since the condominium was a gift to the first appellant by Tay How Seng, it could not be said to be matrimonial asset as it was acquired by the first appellant, no doubt during the subsistence of the marriage, by way of a gift with no contribution whatsoever from the respondent (see s. 76(4)(a) of the Act). In *White v. White (supra)* (HL) Lord Nicholls of Birkenhead stated at p. 994 as follows:

Inherited money and property

I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation

A distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand. A distinction along these line exists, for example, in the Family Law (Scotland) Act 1985 and the (New Zealand) Matrimonial Property Act 1976.

B This distinction is a recognition of the view, widely but no universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. *Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it.* Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

D (emphasis added)

We agreed with Lord Nicholls when he stated that property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage and that in fairness the spouse to whom it was given should be allowed to keep it. This is especially so when s. 76(4)(a) is taken into account.

Shares

[92] As for shares, the first appellant restricted his submission on four companies. They are Tong Ah Co Sdn Bhd, Tay Miang Guan Sdn Bhd, Express Management Services Sdn Bhd and How Tian Enterprise Sdn Bhd. We will deal with them in that order.

Tong Ah Co Sdn Bhd

[93] This is a private limited company and was incorporated on 8 December 1947. In 1963, Tay How Seng had transferred 139 shares to the first appellant. At that material time, the first appellant was only six years old. At diverse dates, Tay How Seng transferred further shares totalling 380 shares to his son, the first appellant.

[94] The learned trial judge found that the 139 shares were a gift to the first appellant by Tay How Seng. However, the learned trial judge held that the balance 380 shares were a matrimonial asset and that the respondent was entitled to 50% of the remaining 380 shares. The respondent on the other hand cross-appealed and pleaded that she was entitled to 50% of 519 shares of the said company, without leaving out the 139 shares gifted to the first appellant by his father/Tay How Seng.

[95] For the reasons we have stated before this, we agreed with the first appellant's submission and found that the learned trial judge had erred in coming to a finding that the balance 380 shares were a matrimonial asset and that the respondent was entitled to 50% of the 380 shares. The 139 shares were a gift to the first appellant when he was a child and could not form part of the matrimonial asset. The 380 shares were also gifts to the first appellant where there was no money transaction for the transfer of all these 380 shares from Tay How Seng to the first appellant. With the same token we dismissed the cross-appeal of the respondent on this aspect.

Tay Miang Guan Sdn Bhd

[96] This is a private limited company and was incorporated on 8 December 1947. In 1965, the Tay How Seng transferred 86 shares to his son, the first appellant. At that time, the first appellant was only eight years old. In 1993, another 86 shares were transferred by Tay How Seng to the first appellant. In 1997, another 34 shares were transferred by Tay How Seng to the first appellant. The first appellant therefore was gifted a total of 120 shares in this company after his marriage to the respondent. The first appellant submitted that these 120 shares are not matrimonial assets as they are gifts from his father.

[97] The respondent in her reply and cross-appeal submitted that the number of units of shares owned by the first appellant in Tay Miang Guan Sdn Bhd in which the respondent is given 50% should be 206, including shares given to the first appellant by his father when he was an eight years old boy. This was because the allegation of gift stated above was not proved by the first appellant or Tay How Seng.

[98] It was our finding that all 120 shares given to the first appellant were gifts as there was no money transaction between the Tay How Seng and the first appellant. As per our earlier reasons for allowing the first appellant's appeal on the issue of gifts, we also allowed the first appellant's appeal and dismissed the respondent's cross-appeal on this aspect.

Express Management Services Sdn Bhd

How Tian Enterprise Sdn Bhd

[99] Express Management Services Sdn Bhd was incorporated on 21 March 1984 while How Tian Enterprise Sdn Bhd was incorporated on 25 September 1979. The shares in both these companies held by the first appellant were found to be matrimonial assets by the learned trial judge and he had ordered that the assets be equally divided between the first appellant and the respondent. However, at the same time the learned trial judge found the shares in these two companies to be worthless as they were making losses. In view of this

A finding by the learned trial judge, it was submitted by the first appellant that the losses incurred by both these companies ought to be taken into account and be borne equally by the respondent.

[100] We dismissed the first appellant's appeal on this aspect as having no merits and we affirmed the learned trial judge's decision on this aspect. It must be remembered that the distribution order was in regard to the shares *per se* and did not involve the internal affairs of these companies regarding the losses they had suffered.

Conclusion

C [101] For the reasons stated above, we unanimously allowed the appeal with costs of RM30,000 here and below. The order of the High Court in respect of our decision where the appeal was allowed was set aside or varied as the case may be. We also unanimously dismissed the respondent's cross-appeal. Deposit was refunded.

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